BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

HARRISON SQUARE PARTNERSHIP,	)	**Case No. 96R-75**
Appellant(s),	)	
v.	)	**FINDINGS AND ORDERS**
SARPY COUNTY BOARD OF EQUALIZATION,	)	
Appellee(s).	)	

Filed April 3, 1997

Appearances:

For the Appellant: Charles R. Clatterbuck
1409 Buck Drive
Bellevue, NE 68805

For the Appellee: Michael A. Smith, Esq.
Deputy Sarpy County Attorney
1210 Golden Gate Drive
Papillion, NE 68046

Before: Commissioners Edwards, Hans and Reynolds

Edwards, for the Commission:

SUMMARY OF DECISION

The Commission determines that the Sarpy County Board of Equalization's action was arbitrary or unreasonable in denying Taxpayer's request for a reduction in value on this commercial property. Therefore the Commission reverses the decision of the Sarpy County Board of Equalization for 1996.

NATURE OF THE CASE

Harrison Square Partnership was represented by Mr. Charles Clatterbuck, a partner ("Taxpayer"). Taxpayer filed a proper and timely protest with the Sarpy County Board of Equalization ("County") because he was dissatisfied with the valuation the County Assessor had placed on his commercial property. Taxpayer alleged that County erred in the application of the income approach to value in establishing the assessed value. County denied the protest, from which decision Taxpayer appeals.

DUTIES OF THE PARTIES

Taxpayer, if dissatisfied with the county assessor's determination of assessed value of Taxpayer's real property, must timely file a written protest with County. Neb. Rev. Stat. §77-1502 (Reissue 1996). Between June 1 and July 25 of each year, County reviews and decides those protests. County is required to fairly and impartially equalize the value of all items of nonagricultural real property in the county so that all such real property is assessed uniformly and proportionately, with no action taken before June 1 nor after July 25 of each year. Agricultural and Horticultural land, as defined in section 77-1359, adjustments and corrections are statutorily specific. Neb. Rev. Stat. §77-1504 (Reissue 1996).

EVIDENCE OFFERED

Taxpayer provided an income and expense statement, his version of the proper income approach to value, and documents from Smith Barney and N.P. Dodge showing profit and loss and expense items for Harrison Square Partnership, all of which are a part of the case file. County offered Exhibit #1, which is a photocopy of the subject property record. Judicial notice was taken, without objection, of the pleadings in Case File 96R-0075; *Marshall & Swift Commercial Valuation Service*; the *Nebraska Assessor's Reference Manuals*, Volumes 1 and 2; the I.A.A.O. textbook, *Property Assessment Valuation*, Second Edition; Title 442 of the Administrative Code (Tax Equalization and Review Commission's Rules and Regulations); the Property Tax Division of the Department of Revenue published 1996 ratios and measures of central tendency required by Neb. Rev. Stat.§77-1327(6); and the 1996 Commercial Sarpy County Profile.

ANALYSIS

Taxpayer presented his income approach worksheet, which is included in the case file. Taxpayer used actual net operating income and also deducted a vacancy rate of 24%. When actual income is used, proper appraisal techniques prohibit the use of a vacancy rate since any vacancy that occurred was accounted for in the actual income. Taxpayer used a 37.5% expense ratio, not the 35% used by County. However, when Taxpayer's income/expense statement's actual expenses are edited for only the allowable expense items to be used in the income approach (as defined in the I.A.A.O. textbook *Property Assessment Valuation*, pages 217 thru 220) Taxpayer's expenses are less than 35% and included the real property taxes. Taxpayer used a capitalization rate of 12.75% (County used 12.25%) which includes the 2.75% tax rate. County's capitalization rate of 12.25% is calculated using the band of investment method. It is comprised of a 9.5% Discount Rate, which accounts for the cost of money and yield to equity, (as defined in *Property Assessment Valuation*, page 230) and a 2.75% Tax Rate, which is the tax rate applicable to the district in which the subject property is located, as testified to by the County Appraiser. The County Appraiser also stated that they round the tax rates to the nearest 5 hundredth. This tax rate was 2.73% rounded to 2.75%. Taxpayer also included real estate taxes in his allowable expense items that are deducted from gross income to arrive at net operating income (NOI). It is proper to account for real estate taxes as an expense item in the income approach to value, but only once. Either via the tax rate as a portion of the capitalization rate or as an expense item.

There was testimony as to whether the capitalization rate of 12.25% was appropriate for this strip mall. Taxpayer testified that the capitalization rate for Bellevue Plaza was 12.50% and for American National Bank Center was 13.00%. The Sarpy County Appraiser testified as to the County's methodology of calculating capitalization rates. The cost of money (discount rate) is determined by the risk attributed to various commercial endeavors. The greater the risk, the higher the discount rate. The discount rate is affected by the location of the property and the desire of investors. County appraiser stated that Harrison Square is not located in a prime area as both Harrison and 36th Street are two lane highways and do not command the traffic flow of some other locations. The tax rate varies from district to district based on local subdivision budget requests. No evidence came before the Commission to contradict the County's determination that 12.25% was the appropriate capitalization rate for the subject property.

When actual income and expense figures and mass appraisal techniques are mixed, the result is an incorrect and skewed valuation. Mass appraisal techniques strive to arrive at a fair market value for the typical property in the class being appraised. Taxpayer's allegation that County's income approach to value was not properly applied to the subject property is correct in only one regard. The vacancy rate impacts the determination of value in the income approach. Vacancy rates may change from day to day as new leases are negotiated and other leases expire. Here, however, the difference between the typical 5% vacancy rate and the actual 24% vacancy rate is too great to be left unaddressed.

During the testimony, it was determined that this strip mall had a large vacancy due to the moving of a large supermarket. County Appraiser said he had driven by in December of 1995 and it didn't appear vacant. Therefore, he did not make any adjustment in the vacancy rate. Taxpayer testified it was a 24% vacancy rate. County offered no evidence to contradict that fact. However, the County Appraiser testified that 30% was the highest vacancy rate that he used even if it was 100% vacant. A 24% vacancy would have a definite negative impact on income and therefore, to value calculated from such income. Using the County application of the income approach to value, the actual vacancy rate of 24% would not be appropriate and the 5% vacancy rate would not be sufficient for this property. The County appraiser testified that had he known of the 24% vacancy rate, he may have considered a 15% vacancy rate. Therefore a 15% vacancy rate would be an appropriate recognition of the vacancy of the subject property and also recognize the County appraiser's professional opinion as to an appropriate rate for the subject property.

Using the County's income approach formula, the calculation determining value is as follows:

Economic Rent:		$312,000
Less 15% vac. rate:	--	$ 46,800
		$265,200
Less 35% exp. ratio	--	$ 92,820
=Net Operating Income		$172,380
÷ by cap rate .1225 =		$1,407,185
x equalization factor of		
.94%	=	$1,322,755

FINDINGS OF FACT

The Commission, in determining cases, is bound to consider only that evidence which has been made a part of the record before it. No other information or evidence may be considered. Neb. Rev. Stat. §77-5016 (3) (Reissue 1996). The Commission may, however, evaluate the evidence presented utilizing it's experience, technical competence, and specialized knowledge. Neb. Rev. Stat. §77-5016 (5) (Reissue 1996).

From the pleadings and the evidence the Commission finds and determines as follows:

I. That Taxpayer owns certain commercial real property located in the City of Bellevue, Sarpy County, Nebraska.

II. That Taxpayer was dissatisfied with the value placed on his commercial real property for 1996 and timely filed a protest with the County. (See VIII.)

III. That County held a hearing and denied Taxpayer's request for a reduction in value of his real commercial property valuation.

IV. That Taxpayer properly and timely filed an appeal from that decision to the Tax Equalization and Review Commission.

V. That the Sarpy County Commercial median ratio of 94% was within the 1996 acceptable commercial ratio range of 92% to 100% as set by the State Board of Equalization and Assessment.

VI. That Taxpayer used an inappropriate income approach to value using both his actual income and expenses as well as County's mass appraisal income approach statistics to arrive at an assessed value that is incorrect and does not reflect the fair market value of the subject property.

VII. That the subject property did have a 24% vacancy rate as of January 1, 1996. That County was unaware of that vacancy and in the calculations used to arrive at assessed value for 1996, the vacancy rate used was 5%.

VIII. That the assessed value placed on subject property for 1996 was $1,478,620.

IX. That the Sarpy County Board of Equalization was arbitrary or unreasonable in not considering the greater vacancy when issuing it's decision.

JURISDICTION

The jurisdiction of the Tax Equalization & Review Commission is set forth in Neb. Rev. Stat. §77-5007 (6)(Reissue 1996).

STANDARD OF REVIEW

The "Unreasonable or Arbitrary" Standard before the Commission

The Tax Equalization and Review Commission is not a court. The Commission was created pursuant to state law to provide for an accessible and affordable system of review of valuation decisions. Under such circumstances, applying the standard devised by the Nebraska Supreme Court to the Commission would be presumptuous and ill-advised.

Therefore, the Commission must adopt a standard applicable to cases it hears and decides. This standard must be in keeping with the precept that tax laws are to be strictly construed, and construed in the light most favorable to the taxpayer. *See, e.g., Nebraska Annual Conference of the United Methodist Church v. Scotts Bluff County Board of Equalization*, 243 Neb. 412, 416, 499 N.W. 2d. 543, 547 (1993), and *Sioux City and Pacific R.R. v. Washington County,* 3 Neb. 30, 32 (1873). In determining that standard, resort must be made to the language of the statute. The Nebraska Supreme Court has often held that statutory construction is a simple task. The Court has held "In construing a statute, it is presumed that the Legislature intended a sensible rather than an absurd result. . . Statutory language is to be given its plain and ordinary meaning. . . " *Metropolitan Utilities Dist. v. Twin Platte Natural Resources Dist.*, 250 Neb. 442, 451, 550 N.W. 2D 907, 913 (1996).

Therefore, the standard is that set forth in the statute. The word "arbitrary" is defined in the Webster's New Collegiate Dictionary (1981) as "arising from will or caprice; selected at random or without reason;" and "unreasonable" is defined as "not governed by or acting according to reason, not conformable to reason; absurd; exceeding the bounds of reason or moderation." Under these definitions, the Commission must affirm the decision of a county board of equalization unless that decision was determined by will or caprice or selected at random; or if the board's decision was not governed by reason; was absurd; or exceeded the bounds of reason or moderation.

CONCLUSIONS OF LAW

Taxpayer's income approach methodology was incorrect because he did not adhere to the professionally accepted appraisal techniques attributable to the income approach to value whether for mass appraisal or for fee appraisal. Taxpayer's calculations include both actual figures and the County's mass appraisal statistics resulting in an erroneous value. However, County's methodology was flawed in the use of a 5% vacancy rate when the subject property actually had a 24% vacancy rate. Using a 15% vacancy rate, in the same income formula, produces a valuation, after equalization, lower than that originally assessed by the County. The Commission must, therefore, and hereby does conclude as a matter of law that the Sarpy County Board of Equalization action was arbitrary or unreasonable. The Commission reverses the decision of the Sarpy County Board of Equalization in denying Taxpayer's request for a reduction in value for subject property.

ORDER

IT IS, THEREFORE, ORDERED as follows:

I. That the 1996 decision of the Sarpy County Board of Equalization is reversed.

II. That the 1996 value for the subject property owned by Harrison Square Partnership with a legal description of Tax Lots D7C & D10 16-14-13 (5.47 Acres) Tax Lots to Bellevue, Nebraska is:

Land	$ 268,363.00
Buildings	$ 1,054,390.00
Total	$ 1,322,755.00

III. That this decision, if no appeal is filed, shall be certified within thirty days to the Sarpy County Treasurer, and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. 77-1511 (Reissue 1996).

IT IS SO ORDERED.

Dated this 3rd day of April, 1997

Seal

Mark P. Reynolds, Chairman

Janet L. Edwards, Commissioner

Robert L. Hans, Commissioner